Monthly Tax Update: JANUARY 2022

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What we are covering this month

- Purveyors SA Mine Services (Pty) Ltd v CSARS (SCA): voluntary disclosure application
- Recent SARS documents and notices
  - Updated Draft IN 28 – Home office expenses: deduction of bond interest
  - VAT Connect Issue 13

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Purveyors SA Mine Services (Pty) Ltd v CSARS

(135/2021) ZASCA 170 (7 December 2021)

- Appeal against the 2020 High Court decision that the VDP application was not “voluntary”

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Purveyors South Africa Mine Services (Pty) Ltd v CSARS
(61689/2019) [2020] ZAGPPHC 409 (25 August 2020)

- Sections 226 and 227 of the TAA.
- Applicant imported aircraft into SA and became liable for import VAT; subsequently had reservations about its VAT liability and approached SARS on the matter.
- SARS advised applicant that it was liable for VAT and penalties.
- Applicant later applied to SARS for VDP under s 226 of the TAA.
- SARS advised that applicant had not met the requirements of s 227.
- Finding: disclosure was not voluntary as SARS was already aware of the information.

  "14.1 The interpretation put forward by applicant is too narrow and does not accord with the purpose of the said sections or what they seek to achieve;

  14.2 The VDD application was not "voluntary" for the reasons referred to;

  14.3 There was no disclosure to Respondent of information of which it was not already aware."

Section 227 of the TAA

Requirements for valid voluntary disclosure.

The requirements for a valid voluntary disclosure are that the **disclosure** must-

(a) be **voluntary**;

(b) involve a **'default**' which has not occurred within five years of the disclosure of similar 'default' by the applicant or a person referred to in s 226(3);

(c) be full and complete in all material respects;

(d) involve a behavior referred to in column 2 of the understatement penalty percentage table in s 223;

(e) not result in a refund due by SARS; and

(f) be made in the prescribed form and manner.

Purveyors South Africa Mine Services (Pty) Ltd v CSARS
[2020] ZAGPPHC Judgment

[7] It was applicant's contention that the crux of applicant's case was that as at the date of submission of its VDP application it had not been given notice by the respondent of the commencement of an audit or criminal investigation into the affairs of the applicant, which had not been concluded as contemplated by the provisions of s 226(2) of the TAA, and that the effect thereof was that this application was indeed "voluntary" as contemplated in s 227(a) of the Act, despite the said prior knowledge on the part of the respondent.

[8] Respondent had contended that s 227 of the Act envisages a disclosure of information or facts of which SARS had been unaware.

Purveyors South Africa Mine Services (Pty) Ltd v CSARS
[2020] ZAGPPHC Judgment

[12] The further question was whether the VDP application was “voluntary”.

The term is not defined but its ordinary meaning is “an act in accordance with the exercise of free will”. If there is an element of compulsion underpinning a particular act, it is no longer done voluntary.

In the context of Part B of Chapter 16 of the TAA, a disclosure is not made voluntary where an application has been made after the taxpayer had been warned that it would be liable for penalties and interest owing from its mentioned default.

It was submitted that the application was brought in fear of being penalised and with a view to avert the consequences referred to.

Purveyors South Africa Mine Services (Pty) Ltd v CSARS
[2020] ZAGPPHC Judgment

[13] Lastly, it was contended on behalf of respondent that there had been no disclosure of information of which SARS had been unaware. This was not the case here. When applicant made the VDP application it was obviously aware that SARS knew of its default. It in fact disclosed nothing new the application was therefor not a valid one. There can be no disclosure to a person if the other already has knowledge thereof: certainly not in the present statutory context.

Purveyors SA Mine Services (Pty) Ltd v CSARS
(135/2021) ZASCA 170 (7 December 2021)

The VDP application was rejected on the basis of non-compliance with s 227.

"Its VDP application was prompted by compliance action by officials of SARS and the advice it received from its auditors… In the light of the aforegoing, it is clear that in order to escape payment of penalties and interest, Purveyors submitted the VDP application.

I agree with the [High] Court that the application by Purveyors was not voluntary and did not meet the requirements of s 227 because SARS knew of its default and warned that it would be liable for VAT plus penalties and interest. Nothing new was disclosed in the application. That said, the appeal must fail."

SARS Guide

- Draft Guide on the Voluntary Disclosure Programme (Issued 20 October 2021; open for comment until 10 December 2021)

Deducting bond interest
Deduction of home office expenses

1	Section 11(a)	General deduction formula
2	Section 23(b)	Private expenses disallowed BUT limited concession for home office
3	Section 23(m)	Denial of deductions for employees other than … s 11(a)/(d) deductions not prohibited s 23(b)
4	CGT (and possibly VAT) consequences	

Deduction of home office expenses

SARS website - see https://www.sars.gov.za/types-of-tax/personal-income-tax/tax-season/home-office-expenses/

General deduction formula s 11(a)

For the purpose of determining the taxable income derived by any person from carrying on any **trade**, there shall be allowed as deductions from the income of such person so derived-

(a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature

Prohibited deduction – private expenses s 23(b)

No deduction of domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises except in respect of such part as may be occupied for the purposes of trade:

Provided that –

(a) such part shall not be deemed to have been occupied for the purposes of trade, unless such part is **specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes**; and

(b) no deduction shall in any event be granted where the taxpayer's trade constitutes any **employment** or office unless

  (i) his income from such employment or office is derived mainly from commission or other variable payments which are based on the taxpayer's work performance and his duties are mainly performed otherwise than in an office which is provided to him by his employer; or

  (ii) his duties are mainly performed in such part.

Use of the home office

A tax deduction for home office expenses is only allowed:

- If the room is regularly and exclusively used for the purposes of the taxpayer's trade (e.g. employment) and is specifically equipped for that purpose. The home office must be set up solely for the purpose of working.
- Salary-earner: duties must be mainly performed in this part of the home (must perform more than 50% of duties in the home office).
- More than 50% of remuneration consists of commission / variable payments: more than 50% of the duties must be performed outside of an office provided by your employer.

Types of taxpayers
s 23(b)

Independent contractors

- No further restriction

Commission-earners

- Duties must be mainly (>50% of the time) performed away from an office provided to by his employer

Other employees

- Duties must be mainly (>50% of the time) performed in the home office

Prohibited deduction – employees s 23(m)

- N/A to agents or representatives whose remuneration is normally derived mainly in the form of commissions based on sales/turnover
- **Prohibited**: expenditure, loss or allowance as contemplated in s 11, relating to any employment/ office held by, any person in respect of which s/he derives any remuneration, as defined in the Fourth Schedule, **other than-**

  (i) contributions to a pension, provident or RA fund - s 11F

  (ii) deductions under s 11 (c) (legal expenses), (e) (wear and tear allowance), (i) (bad debts) or (j) (doubtful debt allowance)

  (iiA) deductions under s 11(nA) or (nB) (amounts refunded)

  (iv) deductions under s 11(a) or (d) (repairs) in respect of any rent of, cost of repairs of or expenses in connection with any dwelling house or domestic premises, to the extent that the deduction is not prohibited under s 23(b).

Draft Interpretation Note 28 (Issue 3)

Issued May 21; Reissued 15 November 2021; Open for comment until 14 January 2022

SARS Briefing note:

- IN 28 provides clarity on the deductibility of home office expenses incurred by persons in employment or persons holding an office.
- During May 2021, an update to IN 28 was published for public comment. The Note has been updated to provide further clarity in response to comments submitted.
- In addition, an issue addressing the deductibility of interest incurred in connection with a home office has been considered and addressed.

SARS FAQs on home office expenses

https://www.sars.gov.za/wp-content/uploads/Docs/Webinarsuppdocs/Home-office-expense-FAQs-updated-17-Nov-2021.pdf

33. I have incurred interest on my mortgage bond, in respect of my home. I use a part of my home as my home office, and meet all of the requirements to claim a home office deduction. Can I claim the mortgage interest?

It has been Revenue practice to allow mortgage interest in the calculation of a claim for home office expenditure. Therefore, for the period ending on 28 February 2022, that is, up to the end of the 2022 year of assessment, you may claim the interest on your mortgage bond. The interest incurred must be apportioned under the normal apportionment rules.

However, section 23(m) only permits employees to claim home office deductions that are permitted under sections 11(a) and (d). Interest on a mortgage bond is an expense that is claimed under section 24J, and is accordingly prohibited from being claimed in terms of section 23(m). Consequently, for the period commencing on 1 March 2022, that is, from the 2023 year of assessment onwards, mortgage interest will not be permissible in the calculation of a claim for home office expenditure.

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Draft IN 28 – para 4.6.2 Permitted expenditure

Interest

- Section 23(m)(iv) excludes from the prohibition against deduction any deduction which is allowed under s 11(a) or s 11(d) in respect of expenses in connection with a premise to the extent that the deduction is not prohibited under s 23(b).
- Depending on the facts, however, interest incurred on most loans used to acquire a premise will meet the requirements for deduction under s 24J and will therefore be deductible under s 24J and not s 11(a). If the interest expense meets the requirements in s 24J, it means the portion of interest incurred in connection with the part of the premises used for purposes of trade (the home office) will be prohibited by s 23(m) and is not deductible.

VAT Connect Issue 13 (November 21)

https://www.sars.gov.za/businesses-and-employers/my-business-and-tax/newsletters/vat-connect-issue-13-november-2021/

Section 72 decisions

- See VAT Connect 10 (March 2020) (VAT Connect 10) and VAT Connect 12 (June 2021) (VAT Connect 12).
- NB: all decisions under s 72 that do not have a stated expiry date will cease to apply from 1 January 2022.
- Vendors that still require a decision to be considered under s 72 in this regard, must apply timeously under the new process.
- Requirements and conditions that must be met in applying for a s 72 decision are set out in BGR 56 "Application for a Decision under Section 72" (BGR 56).
- See *VAT Section 72 Decisions Process Reference Guide* published on 6 April 2021.

VAT Connect Issue 13 (cont.)

https://www.sars.gov.za/businesses-and-employers/my-business-and-tax/newsletters/vat-connect-issue-13-november-2021/

Backdating of alternative methods of apportionment

Mukuru Africa (Pty) Ltd v CSARS [2021] ZASCA 116 (see Oct 21 webinar):

- SCA found that the Appellant could not simply ignore BGR 16 or unilaterally apply its own apportionment method.
- If the Appellant was of the opinion that the STB was not fair and reasonable, it was required under BGR 16 to apply for an alternative apportionment method.
- The effect of this judgment for vendors is that the STB must be regarded as the default apportionment method unless or until a VAT Ruling has been issued to the vendor allowing an alternative method.
- Under proviso (iii) to s 17(1) this alternative apportionment method may only be applied by the vendor with effect from a date within the year of assessment in which the vendor applied to the Commissioner for such a ruling.
- A further effect is that vendors that have not apportioned their input tax in previous years when they were required to do so, cannot overcome the consequences of their non-compliance by applying for a VAT Ruling for an alternative method of apportionment to apply from a date in the past which goes beyond what the law allows.

VAT Connect Issue 13 (cont.)

https://www.sars.gov.za/businesses-and-employers/my-business-and-tax/newsletters/vat-connect-issue-13-november-2021/

Supply of a going concern

- IN 57 "Sale of an enterprise or part thereof as a going concern" discusses the detailed requirements for a supply to be zero-rated under section 11(1)(*e*).
- A specific requirement is that certain aspects must be agreed upon in writing.
- Applicants should therefore not apply for a VAT Ruling merely to confirm that the agreement meets the necessary requirements in order to treat the supply as a going concern. This is because it is a question of fact whether or not the agreement meets the requirements, as opposed to the interpretation or application of the law based on a set of facts.
- As SARS has provided comprehensive guidance on the interpretation of the law in respect of a supply of a going concern in an official publication, it is generally not considered necessary to issue a VAT Ruling in this regard, and applications in this regard may be rejected. However, should there be uncertainty about the interpretation or application of s 11(1)(*e*) in respect of a specific transaction, applicants should clearly illustrate what that uncertainty is, as well as the applicant's interpretation of the VAT Act in that regard, when an application for a VAT Ruling is submitted.

QUESTIONS?

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Thank you for joining us today!

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